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MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES: Chapter One: Distributive Principles of Criminal Law

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Mapping American Criminal Law

Variations across the 50 States

Paul H. Robinson and Tyler Scot Williams



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Preface

It is common for criminal law scholars from outside the United States to discuss the “American rule” in order to compare it to the rule of other countries.¹ As this volume makes clear, however, there is no such thing as an “American rule.” Each of the states, plus the District of Columbia and the federal system, have their own criminal law; there are 52 American criminal codes.

American criminal law scholars know this, of course, but they too commonly speak of the “general rule” as if it reflects some consensus or near consensus position among the states. But the truth is that the landscape of American criminal law is one of almost endless diversity, with few, if any, areas in which there is a consensus or near consensus. Even most American criminal law scholars seem to fail to appreciate the enormous diversity and disagreement among the 52 American jurisdictions.

The best one can do in most instances is to talk of a “majority rule,” but even this is extremely difficult business. Every jurisdiction recognizes a person’s right to defend himself or herself against unlawful force, for example. But what is the “majority rule” in the United States in the formulation of that defense? Jurisdictions disagree on a wide variety of issues within self-defense, most prominently: (a) What constitutes the “unlawful force” that triggers a right to use defensive force? (b) What temporal requirement must be met for an actor’s conduct to be truly “necessary” at that time? (c) What amount of force may be used? (d) When may deadly force be employed? (e) When may an initial aggressor claim self-defense? (f) What is the legal effect, if any, of the defendant provoking the encounter? (g) What is the legal effect of mutual combat on self-defense? (h) Is there a right to resist an unlawful arrest? (i) Is there a duty to retreat from unlawful aggression before using deadly force? There is disagreement among the states on every one of these issues.²

Further, as some of us have demonstrated elsewhere, even when the research is done, it is not so easy to construct the majority American rule. To

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continue with the self-defense example above, not only do American jurisdictions disagree on each of the self-defense issues listed above, but the pattern of states making up the majority view on each individual issue varies from issue to issue. In other words, at the end of the day the “majority rule” for self-defense in the United States is a rule that no jurisdiction actually adopts. It is necessarily a composite of the American “majority rule” on each of the sub-issues.³

Unfortunately, there has been little work done to map the enormous diversity among the states, perhaps because it is an extremely burdensome project, in part for the reasons just noted. Every legal issue requires a major research project investigating the criminal codes and/or case law of all 52 American jurisdictions, and a single legal doctrine may have a half-dozen sub-issues that must each be separately resolved.

Although the paucity of such diversity research is understandable, it is nonetheless regrettable, for it is the matters of disagreement that often point to the most interesting issues for scholars. Why is it that there is disagreement on a particular point? Why hasn’t a consensus formed? What are the advantages and disadvantages of each of the alternative positions such that none have won the day? Or, is it that the alternative positions have been perpetuated simply out of an ignorance by the legislatures of the disagreements among the states? That is, does diversity exist not because of genuine disputes about which position is best but rather because the conflicting positions are not readily known?

This volume is meant to raise awareness of the enormous diversity among the states on issues across the criminal law landscape, to document this diversity with a host of specific illustrations on a wide range of issues, to encourage criminal law scholars to investigate these and the many other points of disagreement that exist among the states, and to encourage each legislature to look to this new diversity scholarship and to the positions taken by other states when the legislature sets out to codify or recodify its criminal law (or to encourage judges to do the same in those jurisdictions that continue to allow judicial criminal law making⁴).

In each of the next 38 chapters, we examine different areas of American criminal law and identify the major groupings among the states on an issue in each area. This is hardly a comprehensive list of the issues on which there are disagreement; it is only a representative sampling. Indeed, we know of no area of American criminal law on which there is not disagreement among the jurisdictions. The only American criminal law universal is its universal diversity.

Nor are the points of disagreement that we map here the only points of diversity within each of the issues that we examine. On the contrary, we commonly pick one particular point of disagreement among the states that

seems particularly interesting or important, but it is commonly only one of many points of interstate disagreement relating to that aspect of criminal law.

For the issue that we take up in each chapter, we group all the American jurisdictions according to the position they take. However, there is such variety in approach that even jurisdictions within the same group commonly take slightly different approaches (which we often attempt to document in the Notes). Thus, even our groupings of states, usually three to seven groups on each issue, understate the extent of American criminal law diversity.

Each chapter provides a map of the United States with each of the states visually coded according to its approach to the issue. These maps, the reader will see, often raise interesting hypotheses about geographic or other state factors that might explain the patterns of agreement and disagreement (red states versus blue states, rural versus urban, rich versus poor, West Coast versus East Coast, etc.). At the end of each chapter we sometimes speculate about the reasons for disagreements, but more importantly, our hope is that the maps will pique the interest of scholars in many disciplines—political scientists, criminologists, criminal law scholars, and sociologists, among others—to investigate alternative hypotheses about why we see the patterns of agreement and disagreement that we see.

Notes

1. For instance, it is common to speak of the “American rule” concerning the duty to rescue and criminal liability for omissions. See, e.g., Peter M. Agulnick and Heidi V. Rivkin, *Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law*, 8 *TOURO INT’L L. REV.* 93, 95 (1998) (referring to the “American rule” that there is no duty to rescue); Christopher H. Schroeder, *Two Methods for Evaluating Duty to Rescue Proposals*, *LAW & CONTEMP. PROBS.*, Summer 1986, at 181 (same); Jay Silver, *The Duty to Rescue: A Reexamination and Proposal*, 26 *WM. & MARY L. REV.* 423, 424 (1985) (same). Likewise, it is common to speak of an “American rule” in the context of the duty to retreat. See, e.g., Garrett Epps, *Any Which Way but Loose: Interpretive Strategies and Attitudes toward Violence in the Evolution of the Anglo-American “Retreat Rule,”* *LAW & CONTEMP. PROBS.*, Winter 1992, at 303, 305 (referring to the “American rule” that a person has the right to “stand [her] ground”); Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 *HARV. J. L. & GENDER* 237, 243 (2008) (same); Joseph E. Olson and David B. Kopel, *All the Way Down the Slippery Slope: Gun Prohibition in England and Some Lessons for Civil Liberties in America*, 22 *HAMLIN L. REV.* 399, 465 (1999) (same). The phrase is often invoked by the courts. In the duty to retreat context, see, e.g., *Cooper v. United States*, 512 A.2d 1002, 1005 (D.C. 1986) (noting that jurisdictions which follow the “American rule” permit a person to “stand [her] ground”) and *Gillis v. United States*, 400 A.2d 311, 312 (D.C. 1979) (same).

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2. Paul H. Robinson, Matthew Kussmaul, Camber Stoddard, Ilya Rudyak, and Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 51–57 (2015).

3. For a statement of such a majority rule for self-defense, see Robinson et al., *supra* note 2, at 50.

4. See Chapter 4, concerning the legality principle, for a list of such jurisdictions.

Distributive Principles of Criminal Law

What do we seek to achieve by imposing criminal liability and punishment? What principles should govern? These may seem like academic questions, but they are not. One cannot rationally and thoughtfully draft or interpret a criminal code, draft sentencing guidelines, or impose a criminal sentence without knowing the answers to these questions. A drafter of criminal code or sentencing guidelines must make hundreds if not thousands of choices in formulating criminal law rules, and sentencing judges must make a large number of discretionary judgments in determining the amount and method of punishment to impose in a given case. And each of these decisions can be affected by the principle that the criminal justice system has adopted for distributing criminal liability and punishment.

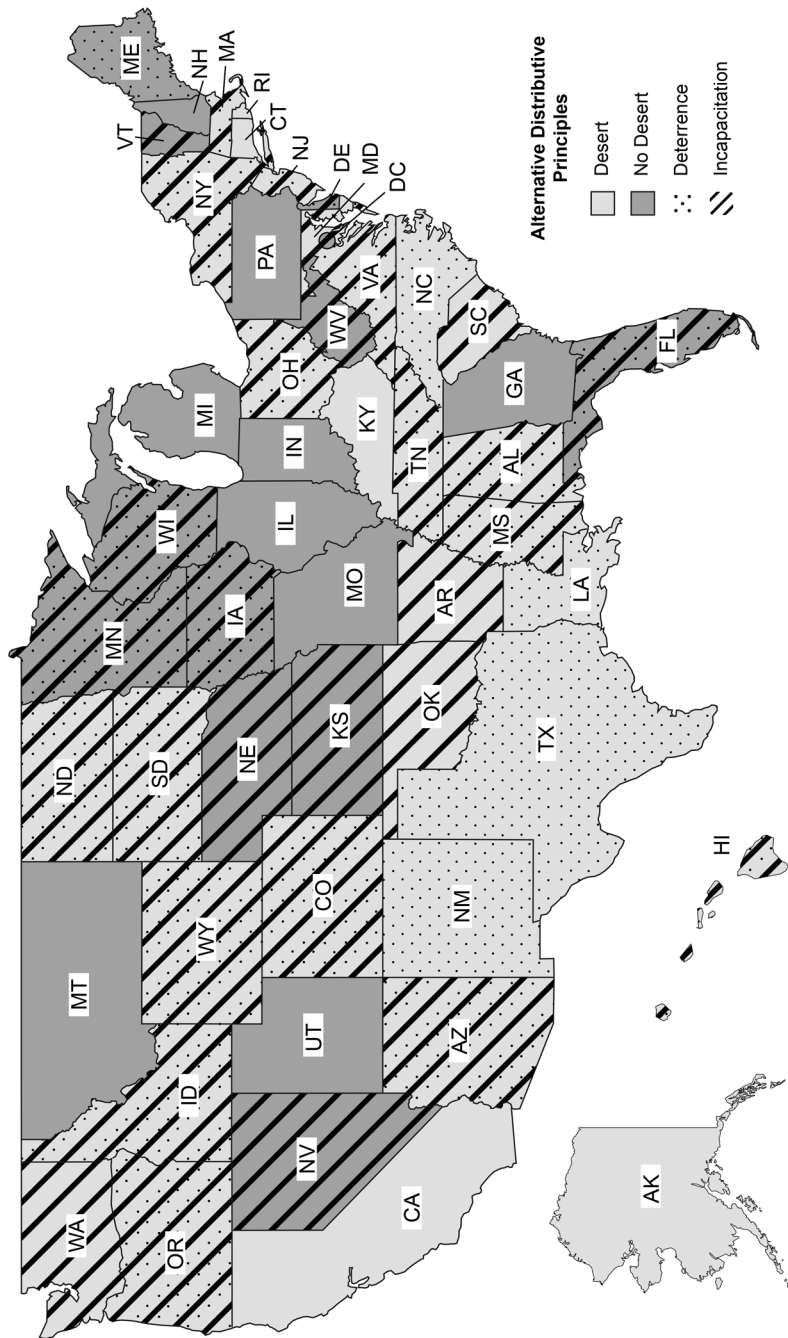
Should criminal liability and punishment rules be set to match an offender's moral blameworthiness for the offense—his *just deserts*? Or should they be set to maximize the general *deterrent* effect of a criminal sentence on other potential offenders? Or should liability and punishment be set according to whether this offender will be dangerous in the future and seek to *incapacitate* him or her during the time of greatest dangerousness?

Which of these principles a jurisdiction adopts as its guide in imposing criminal liability and punishment will have a dramatic effect because each of these alternative principles will generate a quite different distribution. Each will impose a different amount of criminal liability and punishment on a different set of people. Consider two examples.

Should a jurisdiction adopt an insanity defense? If incapacitating dangerous offenders is the criminal law's primary goal, then it certainly should not have such a defense because the people shown to be dangerously mentally ill

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Map 1A

are exactly the people over which the criminal justice system wants to take control. Punishing insane offenders would also send a useful general deterrent message to other (noninsane) potential offenders, demonstrating how serious the system is about punishing violators. A desert principle, in contrast, would insist on exculpating offenders whose insanity renders them blameless.¹

Another example illustrates that while deterrence and incapacitation principles may agree on the insanity defense issue, they commonly disagree with one another. Where an attempt fails by chance—the intended victim bends down to tie his shoe at the moment before the assailant’s bullet is about to strike his head—the incapacitation principle would punish the failed attempt the same as a successful attempt because the assailant is equally dangerous in both cases, while a deterrence principle would want to punish the attempt less seriously than the completed offense so as to maintain a continuing threat of additional punishment to deter a follow-up attempt. If the failed attacker is already fully liable, why wouldn’t he try again?

If desert were the distributive principle in the attempted murder case, it is unclear what the result would be under deontological desert: moral philosophers are divided over whether the resulting death should increase the actor’s punishment where his conduct and culpability are identical. On the other hand, under what one might call “empirical desert,” the result is clear: ordinary people essentially universally agree that the resulting harm should increase punishment, that murder should be punished more seriously than attempted murder.

There are hundreds of issues like the insanity defense and the significance of resulting harm about which alternative principles differ in their distribution of criminal liability and punishment.

Every jurisdiction in the United States, through constitutional provision, statutory provision, state sentencing commission policy, or appellate court opinion, gives some indication of the principle or principles that should be used in constructing, interpreting, or applying its criminal liability and sentencing rules.² States are free to adopt any distributive principle or combination of principles that they choose; there is no federal constitutional limitation on their choice. As Justice Anthony Kennedy wrote in an Eighth Amendment case before the U.S. Supreme Court, “there are a variety of legitimate penological schemes based on the theories of retribution, deterrence, incapacitation, and rehabilitation, and the Eighth Amendment does not mandate the adoption of any one such scheme.”³ And, as Map 1A makes clear, states have exercised this right to choose in a wide variety of ways.

Desert as a Distributive Principle

Thirty states, designated with light shading on the map—Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, New Jersey, New Mexico, New

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York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wyoming⁴—have determined that an offender’s desert, sometimes called “retributive justice,” should serve as one of those guiding purposes.

The principle is expressed in a variety of ways. Many jurisdictions hold that sentencing should provide “just punishment,”⁵ or “deserved” punishment,⁶ or simply that punishment should satisfy or do “justice.”⁷ Occasionally, desert is expressed in terms of “fairness,” as in a sentencing policy that directs courts to administer “fair” punishment.⁸ Two jurisdictions express desert in terms of “personal responsibility” and “accountability for one’s actions.”⁹ One jurisdiction expresses desert in terms of “merited” punishment.¹⁰ Finally, a host of states simply refer to “punishment” as a goal in itself,¹¹ a reference to desert by implication. (This is consistent with the empirical evidence that ordinary people think of “punishment” in desert terms rather than other distributive principle terms.¹²)

The remaining 21 jurisdictions, designated with medium shading on the map—Delaware, District of Columbia, Georgia, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, Pennsylvania, Utah, Vermont, West Virginia, and Wisconsin¹³—have not set desert as a part of their guiding principle for determining criminal liability and punishment.

Deterrence as a Distributive Principle

Twenty-six states, those with a dots overlay on the map—Alabama, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and Wyoming¹⁴—have set or included deterrence as a guiding principle for their criminal code or sentencing policy. This is nearly always expressed by explicitly using the term “deterrence.”

Incapacitation as a Distributive Principle

Thirty-two jurisdictions designated with an overlay of diagonal lines on the map—Alabama, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Hawaii, Idaho, Iowa, Kansas, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming¹⁵—have included incapacitation of the dangerous as part of their guiding principle. This principle is expressed in a variety of ways. Only two states—Ohio and Virginia—actually use the word “incapacitation” outside of the case law. Many

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statutes provide that sentencing should serve the purpose of “confinement,” when necessary to prevent further crime.¹⁶ The same sentiment is often expressed as “remov[ing]” dangerous offenders from society.¹⁷ Many statutes express the goal in terms of “protection” of the public, such as providing imprisonment “when required [for] public protection.”¹⁸ Incapacitation is also expressed in terms of punishment that targets “dangerous,” violent, or repeat offenders, those whose freedom “continues to threaten public safety.”¹⁹

Rehabilitation as a Correctional Policy

Forty-two jurisdictions—Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming—have adopted rehabilitation as a general purpose of their criminal code or sentencing policy. This is often expressed in terms of “rehabilitation”²⁰ or “reformation,”²¹ but occasionally in terms of “correctional” treatment²² or simply “treatment.”²³ Some statutes speak of “improvement” of the offender, suggesting that punishment should “offer the offender an opportunity to improve himself.”²⁴ States may be very specific about correctional programming, for instance, providing that sentences should provide the defendant with “educational or vocational training.”²⁵ Finally, a number of states express rehabilitation in terms of reducing the rate of “recidivism” or the “risk of reoffending.”²⁶

Although rehabilitation is a popular purpose, it stands in a quite different position than the distributive principles of desert, deterrence, and incapacitation discussed above (which is why it has not been included on the map). There is no jurisdiction that has ever sought to use rehabilitation of the offender as its central principle in deciding who should be punished and how much. Rather, it is classically used not as a *distributive principle for criminal liability and punishment* at all but rather as a matter of *correctional policy*.²⁷ That is, no state sets its length of prison term according to that which will be needed to rehabilitate the offender—no prison for those who do not need rehabilitation or cannot be rehabilitated; and a lengthy prison sentence, even for a minor offense, for those who need rehabilitation that will take some time. But most states, such as the 42 explicitly mentioning rehabilitation in one form or another, do want to take the opportunity to rehabilitate an offender during whatever term of imprisonment or noncustodial control has been set by reference to one of the three primary alternative distributive principles of desert, deterrence, or incapacitation of the dangerous.

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Restorative Justice as an Adjudicative Process

A number of states have in one way or another expressed the importance of what some have termed “restorative justice,” which emphasizes restoring the offender to the community by encouraging the offender to repair broken relationships and satisfy debts, particularly those caused by the criminal conduct. This may be expressed as “restoration,”²⁸ “healing,”²⁹ “restitution,”³⁰ or simply “restorative justice.”³¹

However, restorative justice is not a distributive *principle* for criminal liability and punishment but rather an alternative adjudication and sentencing *process*, one which commonly involves bringing together the offender, the victim, their family and friends, and members of the community to decide or recommend an appropriate disposition of the case. There are a great variety of restorative processes, some involving larger groups and some smaller groups. What they have in common is an open discussion, out of the glare of official court rules, where the entire group—some form of this process is called a “sentencing circle”—can try to develop an appropriate disposition that will help to both reintegrate the offender and make whole the victim.

Such restorative processes can be very useful and effective, but they are not “distributive principles” for criminal liability and punishment. It is rather the shared judgments of justice of those people in the sentencing circle that will shape the disposition, not any sort of articulated principle.³² As a practical matter, restorative processes are likely to generate results that track a principle of empirical desert: the empirical evidence is clear that ordinary people think about criminal liability and punishment in desert terms,³³ but nothing in the restorative processes typically demands adherence to this or any other distributive principle.

Variations on a Desert Distributive Principle and Related Rules

Ordinary people’s strong support for a desert distributive principle may be part of the explanation for why the American Law Institute (ALI) approved the first-ever amendment to its Model Penal Code in which it dropped the approach of its original 1962 draft that had encouraged states to consider a laundry list of distributive principles. The Model Penal Code was extremely influential and became the basis for recodifications in three-quarters of the states in the decades following its promulgation. It is the original approach of the Model Penal Code that probably accounts for the range of distributive principles cited by so many jurisdictions, as represented in Map 1A. In its 2007 amendment, however, the Model Penal Code rejects this laundry-list approach in favor of a revised Section 1.02(2) that sets desert as a dominant distributive principle that can never be violated.³⁴

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How do the American jurisdictions differ in their commitment to the desert principle? As Map 1A shows, 30 of the states adopt desert as a distributive principle, although as the map also shows, many of those states also recognize alternative distributive principles that can conflict with desert. Without designating desert as the dominant principle, then, desert may be sacrificed to promote general deterrence or incapacitation of the dangerous.

Map 1B shows the extent of each American jurisdiction's commitment to the desert principle. In some instances, desert is not recognized as a distributive principle but some component of desert is given formal approval, such as requiring proportionality between the seriousness of the offense and the offender's punishment. In some jurisdictions, while not committing to the distributive principle of desert, the authorities at least speak to the endpoint of the desert continuum: they expressly provide that blameless offenders ought to be protected from criminal liability and punishment.

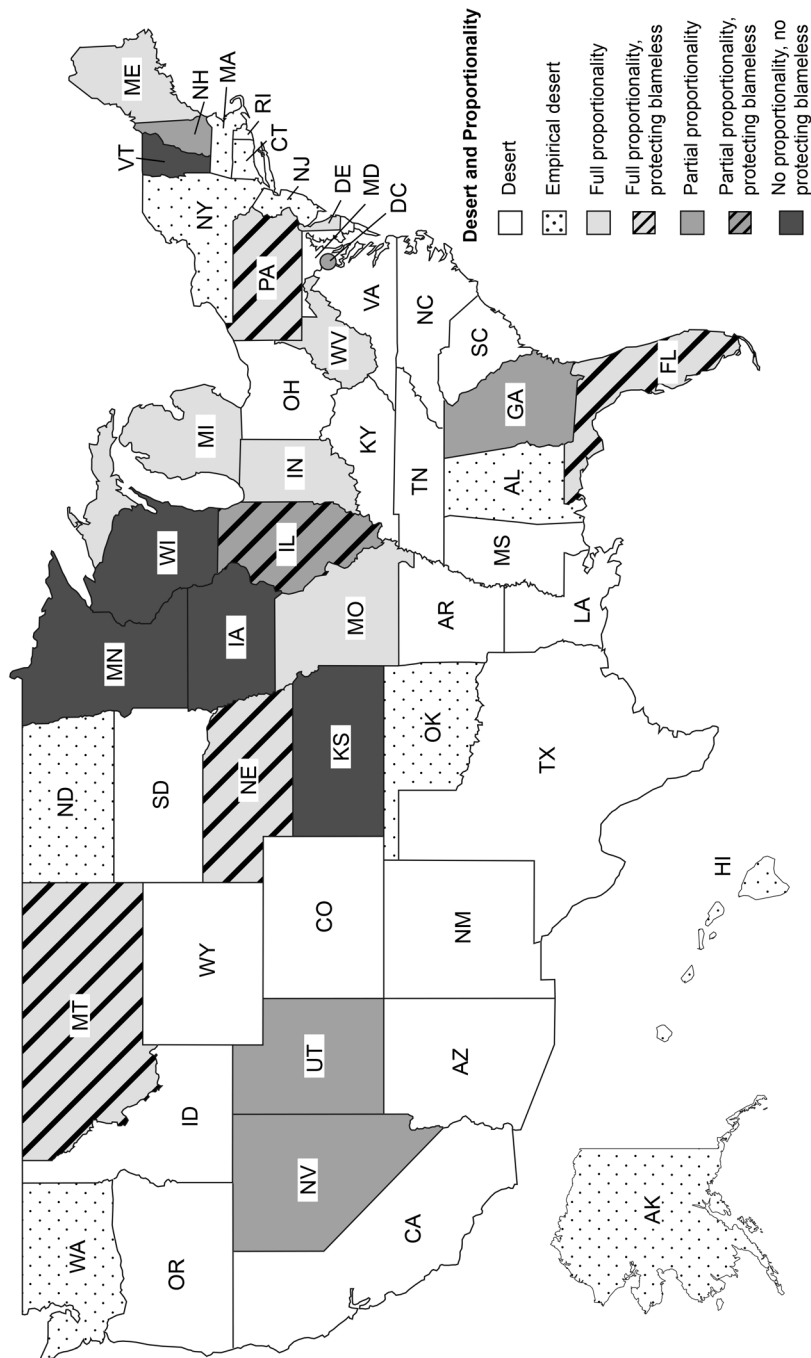
Desert Distributive Principles: Deontological and Empirical

Twenty states, designated with no shading on the map—Arizona, Arkansas, California, Colorado, Idaho, Kentucky, Louisiana, Maryland, Mississippi, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wyoming³⁵—have determined that desert is a guiding purpose of the criminal code or sentencing policy.

Ten other states, shown with no shading but an overlay of dots—Alabama, Alaska, Connecticut, Hawaii, Massachusetts, New Jersey, New York, North Dakota, Oklahoma, and Washington³⁶—similarly adopt desert as a distributive principle but specifically refer to desert as reflected in shared judgments of the community. As noted above, this has been referred to as “empirical desert” in order to distinguish it from the notion of “deontological desert” derived from moral philosophy. Empirical desert is most reliably based on the research of social psychologists who seek to determine the governing principles that ordinary people have in their heads and use in determining their judgments of justice, as compared to deontological desert, which is derived from logical reasoning, classically by moral philosophers. (Empirical research has shown that there is an enormous amount of agreement on basic principles of justice across demographics, at least with regard to the core of wrongdoing.³⁷)

A jurisdiction's adoption of empirical desert as a distributive principle is expressed in a number of ways. Some codes state that punishment is the public's “condemnation” of, or its “appropriate response” to, the offender's conduct.³⁸ Sometimes empirical desert is expressed in terms of holding the offender “accountable” to the community³⁹ or of vindicating public norms.⁴⁰ Some jurisdictions simply state that punishment ought to “promote respect for the law.”⁴¹

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The remaining 21 jurisdictions do not openly recognize desert as a distributive principle. However, most of them at least recognize some component of desert—that is, recognize either a principle of proportionality between the seriousness of the offense and the seriousness of the punishment, or make some effort to protect the blameless from criminal liability and punishment, or both.

The Principle of Full Offense Proportionality

Seven states, shown with light shading on the map—Delaware, Indiana, Maine, Michigan, Missouri, New Hampshire, and West Virginia⁴²—do not include justice or desert as a guiding principle. However, they have adopted a principle of proportionality between the seriousness of the punishment and the seriousness of the offense. (A desert distributive principle would go further and would take into account not just the seriousness of the offense harm but also the offender’s culpability, excuses, and mitigations. In other words, a desert principle would require proportionality between not just the offense harm but the *overall blameworthiness of the offender* and the seriousness of the punishment.)

A common way of expressing the adoption of such an offense proportionality requirement is to call for punishment to “differentiate” between “serious and minor offenses,”⁴³ or that punishment be “proportioned”⁴⁴ or “commensurate”⁴⁵ with the nature or harm of the offense.

Full Offense Proportionality Plus Protecting the Blameless

Four states, designated with light shading and an overlay of diagonal lines—Florida, Montana, Nebraska, and Pennsylvania⁴⁶—go beyond an offense proportionality rule to also specifically adopt a provision that a blameless person should be exempt from punishment. Such a provision only adopts the endpoint of the desert principle: it protects the blameless from punishment but does not require that the extent of punishment should otherwise track the extent of an offender’s blameworthiness.

States in this category commonly “limit the condemnation of conduct as criminal when it is without fault”⁴⁷ or “safeguard conduct that is without fault from being condemned as criminal.”⁴⁸ Although the states in this group fall short of a full desert principle, they do better in approximating desert than any other nondesert group.

A Partial Offense Proportionality Principle

Four jurisdictions, shown with medium shading on the map—District of Columbia, Georgia, Nevada, and Utah⁴⁹—have adopted a weaker form of the offense proportionality rule, stating that punishment simply ought to take

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account of the “seriousness,”⁵⁰ “severity,”⁵¹ or “gravity”⁵² of the offense.⁵³ That is, the directive is satisfied simply by taking account of the offense seriousness in some way; it does not require that the punishment be proportionate to the offense seriousness.

Partial Offense Proportionality Plus Protecting Blameless

One state, Illinois, with medium shading on the map plus an overlay of diagonal lines, has adopted a partial offense proportionality rule⁵⁴ and a provision that the system ought to avoid punishing blameless offenders.⁵⁵ By explicitly providing for the protection of blameless persons, Illinois does better than the group immediately above but still leaves itself far away from a desert principle.

No Proportionality and No Protection of the Blameless

Five states, designated with black shading on the map—Iowa, Kansas, Minnesota, Vermont, and Wisconsin⁵⁶—have not adopted desert, justice, offense proportionality, or even protection of the blameless as a distributive principle.

Observations and Speculations

It seems clear from the maps above that most jurisdictions have not yet caught up with the ALI’s adoption, in its 2007 amendment to the Model Penal Code, of desert as the inviolate distributive principle. Why this gap between the historically influential ALI and current authorities in the states?

Part of the responsibility no doubt falls on the ALI itself. From its initial promulgation in 1962 until its amendment in 2007, even the Model Penal Code urged states to adopt a laundry list of alternative distributive principles that allowed code and sentencing guideline drafters and individual sentencing judges to sacrifice just deserts to promote other distributive principles, typically crime control through general deterrence or incapacitation of the dangerous.

But the intervening years have revealed much about the limitations of deterrence and incapacitation principles, as well as revealing the crime control benefits of a criminal law that promotes justice rather than sacrifices it to deterrent and incapacitation goals. There is an enormous literature on the subject, but some of the key findings might be summarized this way.⁵⁷

Generally, deterrence has the potential to be an enormously efficient crime control mechanism. By punishing a single offender, one can send a deterrent threat to hundreds or even thousands of potential offenders that could be just the thing to change their mind about committing a contemplated offense. General deterrence does work at least in the sense that having a criminal justice system that imposes punishment for violations is likely to have an effect on

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people's decisions to commit crimes. What does not work is using general deterrence to formulate criminal law and sentencing rules—that is, to use it as a distributive principle for criminal liability and punishment, such as to decide whether to provide an insanity defense, whether to grade attempts the same as the substantive offense, or hundreds of other specific criminal code or sentencing decisions.

For general deterrence to work effectively as a distributive principle, at least three conditions must be present. First, the intended target must know about the deterrence-based rule—the treatment of the insanity defense and the grading attempts. But the reality is that the target audience rarely knows the law. Second, even if they do know the law, the target audience must be rational calculators who will take that information into account and alter their conduct to most effectively promote their own interests. Yet, the reality is that most in the target audience are commonly highly irrational in their thinking because of the influence of drugs, alcoholism, impulsiveness, mental or emotional disturbance, or a host of other factors. Finally, even if the target audience knows the law and are rational calculators, they will not be deterred by the threat of criminal punishment unless their calculations lead them to conclude that the costs of the contemplated offense outweigh the benefits. Yet the conviction and punishment rates are so low and the threatened punishment so remote that, in comparison to the immediate benefit of the contemplated offense—such as a robbery that will produce the money to immediately buy drugs—the target audience is more likely to conclude that the benefits of the offense outweigh the costs.⁵⁸

Making a general deterrence distributive principle even less attractive is the fact that there is already a general deterrent effect in the punishment threatened by a desert distributive principle. If a deterrence-based principle is to provide significantly greater deterrent effect, it can do so only by means of deviating from desert, as in doing injustice, which the empirical desert research shows can incrementally undercut effective crime control. Thus, even if one could gain some greater deterrent effect by doing injustice, which may be a rare opportunity, even that greater deterrent effect may be outweighed by the system's loss of crime control effectiveness that comes from its loss of moral credibility with the community.

In contrast, an incapacitation distributive principle does in fact work. Putting an offender in prison, for example, will prevent the offender from committing other offenses—at least against persons not in prison. The problem, however, is that clinicians have a limited ability to reliably predict who will in fact be dangerous in the future. Making things worse, the “criminal justice” system seems to feel obliged to look like it is doing justice for past offenses rather openly admitting that it is a preventive detention system whose only focus is future offenses. Thus, it tends to cloak its preventive detention to look like criminal justice by focusing not so openly on clinical assessments of future

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dangerousness but instead on factors like past criminal record. In most sentencing guidelines, for example, an offender's prior criminal history may count for much more of the resulting sentence than the offense actually committed, on a theory that past criminality predicts future criminality. Unfortunately, that focus further weakens the accuracy of the future dangerousness prediction. The ultimate effect is seriously high false-positive rates—predictions of future dangerousness that are in fact false—that have the effect of wasting correctional expenditures and unjustifiably intruding in the lives of the detainees.⁵⁹

At the same time, empirical studies have suggested that there is not just a deontological virtue in following a desert distributive principle—doing justice is good in itself that requires no other justification—but also that it has a significant crime control benefit. Criminal justice systems that are seen as regularly doing injustice or regularly failing to do justice, especially when these deviations from desert are predictable results of the system's criminal law rules, are systems that are likely to provoke subversion and resistance. In contrast, a criminal justice system that earns a reputation as being devoted to doing justice above all else—to giving people the punishment they deserve, no more and no less—is a system that is likely to inspire greater cooperation, acquiescence, and deference. And, perhaps most importantly, a system that has earned a reputation for moral credibility—as being a reliable authority of what is and is not truly condemnable—is a system that is more likely to lead people to internalize its norms. It is also a system that has the power of its moral credibility to help shift community norms when needed.⁶⁰

Notice that these crime control benefits of a desert distribution flow not from a distributive principle of deontological desert derived from the reasoning of moral philosophers. Instead, the crime control benefits of a desert distribution flow from criminal law building moral credibility *with the community*, primarily by setting criminal liability and punishment distributive rules that track the shared judgments of justice of ordinary people.⁶¹ As noted earlier, this “empirical desert” is recognized as a distributive principle only in 10 states. And even then, most of those states allow other distributive principles to be promoted at the expense of empirical desert.

Although the case for desert as the dominant distributive principle is strengthening, it will no doubt take a long time for these truths to percolate down into the political conversations that influence the formulation of the distributive principles that govern criminal codes, sentencing guidelines, and the calculations of individual sentencing judges.

Notes

1. For a more detailed discussion of how these alternative distributive principles differ, see Paul H. Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* at 7–20 (Oxford 2008).

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2. Ala. Code § 13A-1-3; Ala. Code § 12-25-2; Alaska Stat. Ann. § 11.81.100; Alaska Const. art. I, § 12; Ariz. Rev. Stat. Ann. § 13-101; Ariz. Rev. Stat. Ann. § 13-101.01; Ark. Code Ann. § 16-90-801; Cal. Penal Code § 1170; Colo. Rev. Stat. Ann. § 18-1-102; Colo. Rev. Stat. Ann. § 18-1-102.5; Conn. Gen. Stat. Ann. § 54-300; Del. Code Ann. tit. 11, § 201; Del. Code Ann. tit. 11, § 6502; D.C. Code Ann. § 3-101; Fla. Stat. Ann. § 775.012; Ga. Code Ann. § 16-1-2; Haw. Rev. Stat. Ann. § 706-606; Idaho Code Ann. § 19-2521; 720 Ill. Comp. Stat. Ann. 5/1-2; Ind. Const. art. I, § 18; Ind. Const. art. I, § 16; Iowa Code Ann. § 901.5; Kan. Stat. Ann. § 21-6601; Ky. Rev. Stat. Ann. § 532.007; La. Stat. Ann. § 15:321; Me. Const. art. I, § 9; Me. Rev. Stat. tit. 17-A, § 1151; Md. Code Ann., Crim. Proc. § 6-202; Mass. Gen. Laws Ann. ch. 211E, § 2; Mich. Comp. Laws Ann. § 769.33a; Minn. Stat. Ann. § 609.01; Minn. Stat. Ann. § 364.01; Mo. Ann. Stat. § 558.019; *Missouri Sentencing Advisory Commission—Purpose and Goals*, Missouri Sentencing Advisory Commission (last accessed Sept. 13, 2017), <http://www.mosac.mo.gov/page.jsp?id=45401> (stating that official purpose of sentencing commission is to ensure “proportionality of punishment”); Mont. Code Ann. § 45-1-102; Mont. Const. art. II, § 28; Neb. Rev. Stat. Ann. § 28-102; Neb. Const. art. I, § 15; Nev. Rev. Stat. Ann. § SB 451, § 6; N.H. Const. Pt. 1, art. XVIII; N.H. Rev. Stat. Ann. § 651:61-a; N.J. Stat. Ann. § 2C:1-2; N.Y. Penal Law § 1.05; N.C. Const. art. XI, § 2; N.C. Gen. Stat. Ann. § 164-42.1; N.C. Gen. Stat. Ann. § 164-41; N.D. Cent. Code Ann. § 12.1-01-02; Ohio Rev. Code Ann. § 2929.11; Ohio Rev. Code Ann. § 181.24; Okla. Stat. Ann. tit. 22, § 234; Okla. Stat. Ann. tit. 22, § 1514; Or. Rev. Stat. Ann. § 161.025; Or. Const. art. I, § 15; 18 Pa. Stat. and Cons. Stat. Ann. § 104; R.I. Const. art. I, § 8; 12 R.I. Gen. Laws Ann. § 12-19.3-1; Tenn. Code Ann. § 39-11-101; Tenn. Code Ann. § 40-35-102; Tenn. Code Ann. § 40-35-103; Tex. Penal Code Ann. § 1.02; Utah Code Ann. § 76-1-104; Vt. Stat. Ann. tit. 13, § 7030; Va. Code Ann. § 17.1-801; Wash. Rev. Code Ann. § 9A.04.020; Wash. Rev. Code Ann. § 9.94A.010; W. Va. Const. art. III, § 5; *State v. Broughton*, 196 W. Va. 281, 292, 470 S.E.2d 413, 424 (1996) (internal quotations and citations omitted) (interpreting the constitutional requirement of proportionality to include incapacitation); Wyo. Const. art. I, § 15; *Bear Cloud v. State*, 2012 WY 16, ¶ 63, 275 P.3d 377, 402 (stating that the four legitimate goals of penal sanctions are retribution, deterrence, incapacitation, and rehabilitation). Five states—Mississippi, New Mexico, South Carolina, South Dakota, and Wisconsin—have not codified general purposes as to criminal law or sentencing, either by statute, commission policy, or constitutional provision. For these jurisdictions, court decisions guide sentencing policy. See *Taggart v. State*, 957 So. 2d 981, 994 (Miss. 2007) (adopting principles of rehabilitation, retribution, “separation from society,” and deterrence); *State v. Kirby*, 2003-NMCA-074, ¶ 28, 133 N.M. 782, 789, 70 P.3d 772, 779 (“[T]he traditional aims of punishment [are] retribution and deterrence.”); *State v. Jones*, 2010-NMSC-012, ¶ 35, 148 N.M. 1, 10, 229 P.3d 474, 483 (“[U]nlike the adult criminal justice system, with its focus on punishment and deterrence, the juvenile justice system reflects a policy favoring the rehabilitation and treatment of children.”); *State v. Tucker*, 324 S.C. 155, 174, 478 S.E.2d 260, 270 (1996) (recognizing incapacitation and

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rehabilitation as proper goals of sentencing); *State v. Fletcher*, 322 S.C. 256, 260, 471 S.E.2d 702, 704 (Ct. App. 1996) (recognizing “punishment” per se as a proper goal of sentencing); *State v. Talla*, 2017 S.D. 34, ¶ 14, 897 N.W.2d 351, 355 (stating that retribution, deterrence, incapacitation, and rehabilitation are legitimate penological goals); *State v. Setagord*, 211 Wis. 2d 397, 416, 565 N.W.2d 506, 514 (1997) (holding that the primary considerations in assigning punishment are the offender’s rehabilitative needs and the interests of deterrence and incapacitation).

3. *Harmelin v. Michigan*, 501 U.S. 957, 959, 111 S. Ct. 2680, 2683, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring in part).

4. See *supra* note 2.

5. Alabama (“just and adequate punishment”), Arizona (“just and deserved punishment”), Connecticut (“just punishment”), Hawaii (“just punishment”), Massachusetts (“punish the offender justly” and “provide just punishment”), Virginia (“just criminal penalties”), and Washington (“punishment which is just”). See *supra* note 1.

6. Arizona (“just and deserved punishment”), Colorado (“a sentence [the offender] deserves”), and Tennessee (“justly deserved”). See *supra* note 2.

7. North Carolina (“satisfy justice”), Oklahoma (do “justice”), and Rhode Island (“do justice to the victim [and] the offender”). See *supra* note 2.

8. Connecticut (“fair, just, and equitable”) and Maryland (“fair and proportional”). See *supra* note 1.

9. Oregon (“personal responsibility, accountability for one’s actions”) and Kentucky (“hold offenders accountable”). See *supra* note 2.

10. North Dakota (“merited punishment”). See *supra* note 2.

11. California, Colorado, Idaho, Louisiana, Ohio, Oklahoma, and Texas. See *supra* note 2.

12. See Paul H. Robinson, *Intuitions of Justice and Utility of Desert*, Part I (The Nature of Judgments about Justice) (Oxford 2013); Robinson, *Distributive Principles of Criminal Law*, *supra* note 1, Chapters 7 and 8.

13. See *supra* note 2.

14. See *supra* note 2.

15. See *supra* note 2.

16. Alabama, Delaware, Florida, Minnesota, New Jersey, New York, North Dakota, and Oregon. See *supra* note 1.

17. Arizona (“remove from society persons whose conduct continues to threaten public safety”), Arkansas (“protect the public by restraining offenders”), and Tennessee (“[restrain] repeat offenders”). See *supra* note 1.

18. Alabama, Colorado (“provide [punishment] when required in the interests of public protection”), Hawaii, Iowa, Massachusetts, Nevada, Ohio, Oklahoma (“incarceration [is] a punishment and . . . a means of protecting the public”), and Vermont (courts should consider “the risk to self, others, and the community at large presented by the defendant”). See *supra* note 2.

19. District of Columbia (punish with “due regard for the . . . dangerousness of the offender”), Hawaii (“protect the public from further crimes of the

defendant”), Idaho (imprisonment imposed when there is an “undue risk [that] defendant will commit another crime”), Iowa (“protection of the community from further offenses by the defendant and others”), Kansas (goal “that dangerous offenders shall be correctively treated in custody for long terms as needed”), Maryland (imprisonment for “violent” or “career” criminals), Massachusetts (“protect the public from further crimes of the defendant”), Nebraska (“subject to public control persons whose conduct indicates that they are disposed to commit crimes”), Nevada (target offenders with “predatory or violent nature,” who “must receive sentences which reflect the need to ensure the safety and protection of the public”), New Jersey (“subject to public control persons whose conduct indicates that they are disposed to commit offenses”), Ohio (“protect the public from future crime by the offender”), Tennessee (“[restrain] repeat offenders”), Virginia (“due regard . . . to the dangerousness of the offender”), and Washington (“reduce the risk of reoffending by offenders in the community”). See *supra* note 2.

20. Alabama, Alaska, Arkansas (“rehabilitation and restoration to the community”), California, Colorado, Connecticut (“rehabilitation and reintegration”), Delaware (“rehabilitation and restoration [as] useful, law-abiding citizens within the community”), District of Columbia, Florida (“opportunity for rehabilitation”), Georgia, Illinois, Iowa, Louisiana, Maine, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina (“rehabilitation and restoration”), South Dakota, Tennessee, Texas, Utah, and Wisconsin (address “rehabilitative needs”). See *supra* note 2.

21. Indiana, Montana, New Hampshire, North Carolina, Oregon, and Wyoming. See *supra* note 1.

22. Hawaii (“correctional treatment”), Idaho (“correctional treatment”), Kansas (“[corrective] treat[ment]”), and Maryland (“[correction] options . . . for appropriate criminals”). See *supra* note 1.

23. Vermont. See *supra* note 2.

24. Kentucky (“improv[e] outcomes for . . . offenders”) and Washington (“offer the offender an opportunity to improve himself or herself”).

25. Hawaii (“provide the defendant with needed educational or vocational training, medical care, or other correctional treatment”) and Massachusetts (“provide the defendant with needed educational or vocational training”). See *supra* note 2.

26. Kentucky (“reduc[e] recidivism and criminal behavior”) and Washington (“reduce the risk of reoffending by offenders in the community”). See *supra* note 2.

27. See generally Robinson, *Distributive Principles of Criminal Law*, *supra* note 1, Chapter 5 (Rehabilitation).

28. Arkansas, Colorado, and Delaware. See *supra* note 2.

29. Colorado. See *supra* note 2.

30. For instance, Alaska, Arkansas, Idaho, Maine, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, and Tennessee have all incorporated restitution into their general purposes statutes. See *supra* note 2.

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31. California, Colorado, and Missouri. See *supra* note 2.

32. See generally Robinson, *Distributive Principles of Criminal Law*, *supra* note 1, Chapter 9 (Restorative Justice).

33. See Robinson, *Intuitions of Justice and Utility of Desert*, Part I (The Nature of Judgments about Justice) (Oxford 2013); Robinson, *Distributive Principles of Criminal Law*, *supra* note 1, Chapters 7 and 8.

34. Robinson, *Distributive Principles of Criminal Law*, *supra* note 1, Chapter 11.B.

35. See *supra* note 2.

36. See *supra* note 2.

37. See Robinson, *Intuitions of Justice and Utility of Desert*, *supra* note 1, Chapters 1 and 2.

38. Alaska (“community[s] condemnation of the offender”), New Jersey (“condemn conduct [that hurts the] public interests”) and New York (“provide appropriate public response to particular offenses”). See *supra* note 2.

39. Connecticut (“[hold] the offender accountable to the community”). See *supra* note 2.

40. North Dakota (“ensure the public safety . . . through the vindication of public norms by the imposition of merited punishment”) and Oklahoma (“demonstrate . . . that the offender’s conduct is unacceptable to society”). See *supra* note 2.

41. Alabama, Hawaii, Massachusetts, and Washington. See *supra* note 2.

42. See *supra* note 2.

43. Delaware. See *supra* note 1. This formulation is also adopted by a number of desert jurisdictions, including Alabama, Alaska, Arizona, Colorado, Florida, Montana, Nebraska, New York, Oregon, Pennsylvania, and Washington. See *supra* note 2. But the breadth of the desert principle makes up for the limitations of the proportionality principle by itself.

44. Delaware, Indiana, Maine, Missouri, New Hampshire, and West Virginia. See *supra* note 2. This formulation is also adopted by some desert jurisdictions, including Alabama, Arizona, Delaware, Maryland, Nebraska, New York, Rhode Island, and Washington. See *supra* note 2. But the breadth of the desert principle makes up for the limitations of the proportionality principle by itself.

45. This principle is adopted by Arkansas, a desert jurisdiction. Arkansas policy is that punishment ought to be “commensurate” with the nature of the offense, “taking into account factors that may diminish or increase an offender’s culpability.” See *supra* note 1. But the breadth of the desert principle makes up for the limitations of the proportionality principle by itself.

46. See *supra* note 2.

47. Alaska, Arizona, Colorado, and Illinois have adopted the formulation, though none of the four full proportionality states have adopted it. See *supra* note 2.

48. Florida (“safeguard conduct that is without fault . . . from being condemned as criminal”); Montana (“safeguard conduct that is without fault from condemnation as criminal”); Nebraska (“safeguard conduct that is without fault and which is essentially victimless in its effect from condemnation as criminal”); Pennsylvania (“safeguard conduct that is without fault from condemnation as criminal”).

See *supra* note 2. Some desert states have also adopted a similar provision: North Dakota, Texas, and Washington. See *supra* note 2.

49. See *supra* note 2.

50. The District of Columbia (“due regard for the . . . seriousness of the offense”), Georgia (“prescribe penalties which are proportionate to the seriousness of the crimes”), Illinois (“prescribe penalties which are proportionate to the seriousness of offenses”), and Utah (“proportionate to the seriousness of [the] [offense]”) use this language. See *supra* note 2. A number of desert and full proportionality jurisdictions use the language of seriousness: California, Connecticut, Hawaii, Idaho, Massachusetts, Michigan, North Dakota, Ohio, Oregon, Tennessee, Texas, Virginia, and Washington. See *supra* note 2.

51. Nevada (“[impose] sentences that increase in direct proportion to the severity of [the] crimes and [the] histories of criminality”). See *supra* note 2.

52. One full proportionality jurisdiction has also adopted this partial proportionality formulation: Maine (“[impose] sentences that do not diminish the gravity of offenses”). See *supra* note 2.

53. Note that one full proportionality jurisdiction—Pennsylvania—has also adopted a kind of partial proportionality provision, with a purpose to “safeguard offenders against excessive, disproportionate[, or] arbitrary punishment.” See *supra* note 2.

54. See *supra* note 47.

55. Illinois (“limit the condemnation of conduct as criminal when it is without fault”). See *supra* note 2.

56. See *supra* note 2.

57. See generally Robinson, *Distributive Principles of Criminal Law*, *supra* note 1.

58. Robinson, *Distributive Principles of Criminal Law*, *supra* note 1, Chapters 3 and 4.

59. Robinson, *Distributive Principles of Criminal Law*, *supra* note 1, Chapter 6.

60. Robinson, *Distributive Principles of Criminal Law*, *supra* note 1, Chapter 7.

61. Robinson, *Distributive Principles of Criminal Law*, *supra* note 1, Chapter 8.